

# AGREEMENT-BASED REGULATION OF FEE-BASED SERVICES: THEORETICAL AND PRACTICAL APPLICATION

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## ABSTRACT

*Improving the legal mechanism to provide with compensated services seems to be highly relevant and significant, since it opens the way for further study of related categories and identification of practical problems in the provision of services as a rapidly developing and promising industry. At the same time, the current legislation does not clarify the term "service" as a legal category, does not contain an exhaustive list of services, which is accompanied by many disputes in legal precedents.*

*This scientific article formulates the concept of a service, outline further prospects to improve civil legislation on the issues of agreement-based regulation of fee-based services. Possible changes and additions to the Civil Code of the Russian Federation in terms of regulating fee-based service agreements have been developed and proposed.*

**Keywords:** Service, Agreement, Fee-Based Services, Agreement-Based Regulation, Agreement Scope, Formation Mechanism, Judicial Defense

## INTRODUCTION

Lobbying today is one of the most discussed topic both from an economic and, especially, from a legal point of view. Service is a legal structure that has appeared in Roman law and has not lost its significance and importance to this day. Even in Roman law, there were references to the agreement of services. In Russia, for a long period of time, contracts for the provision of services remained outside the scope of legal regulation, however, dynamic changes in the direction of development of the state and society led to the fact that civil circulation expanded, and legal relations became more complex and detailed.

The fact that service sector in modern Russia exists and is expanding rapidly confirms the firmness of fulfilling the assumed liabilities in order to respect the rights and legitimate interests of others. Various tools are used to ensure the fulfillment of contract liabilities and to protect violated rights in the event of their non-fulfillment within the framework of fee-based services. "Business activity, being a type of economic activity, includes the organization, provision, management and direct implementation of production." It should be admitted that "until now the family economy has not been considered as an alternative source for the development of entrepreneurship in Russia. The transition to market relations has led to an increase in unemployment ...".

The main regulatory act governing the legal regime for the provision of fee-based services is the Civil Code of the Russian Federation. Contractual relationship that develops in the mode of rendering services are covered by the norms of general provisions of civil law and provisions on the law of obligation. Special rules regarding the provision of fee-based services are the provisions of

Chapter 39 of the Civil Code of the Russian Federation. The allocation of this chapter in the system of civil law relations is not unreasonable, since it is due to the need to regulate relations, the demand for which has recently continued to grow rapidly, and also due to the fact that the provision of services is not always covered by other contracts, for example, such like storage, commission or bailment. Article 779 of the Civil Code of the Russian Federation determines the general provisions of the agreement of fee-based services.

The development of modern legal relations contributes to an increase in the number of contractual relationship, which the sphere of fee-based services is developing with, and inter sectoral regulation becomes more complicated. "One of the main trends in the development of both modern scientific knowledge in general and legal science in particular is the expansion of systematic approach in studying the nature of the phenomena under consideration. It is necessary to pay attention to the establishment of inter sectoral links between civil, labor, family and business relations. "

In the process of forming legal relations regarding the provision of fee-based services, the parties always have the opportunity to come to an agreement and are able to come to a consensus but often due to the will of various circumstances that depend and do not depend on the parties, obligations are violated - they are performed improperly or not at all. In this context, it is not even the choice of one or another method of protecting the rights of customers and performers that is of interest, but the strengthening of the mechanism for the legal regulation of relations regarding the provision of services. At the same time, a legal analysis of the forms and methods of protecting rights and interests in the provision of fee-based services allows us to talk about whether the protection tool chosen by the copyright holder allowed to restore economic well-being, improve the situation of a person whose rights or interests have suffered as a result of a civil offense.

The service sector is directly related to property relations. "There is a regulation of civil relations, entrepreneurial activity, relations with the participation of public institutions, state bodies at the international legal level. Relations in the field of Russian Federation property rights security and protection have the widest application at the international level, especially in the light of the so-called sanctions of foreign states currently applied to the Russian Federation, which are mainly discriminatory in relation to Russia (Ershova, 2016).

## METHODS

Methodological basis of the study is a set of general scientific and specific scientific research methods including historical, logical, system analysis, scientific research, comparative legal, statistical, functional and structural methods of analysis and synthesis, concretization, empirical and theoretical - analogy and deduction (Levushkin, 2019).

As it's known, referring a contract to a certain type is called qualification. The external characteristic features of a specific business agreement and obligations are the name of the agreement, application scope and its parties. As legislation analysis and various types of legal entrepreneurial practice show, these are absolutely interdependent categories for the purpose to identify an entrepreneurial agreement by its type. Today the service market is developing actively and dynamically: there are met the needs not only of social, cultural or spiritual scale, but also global ones, for example, using the Internet. Services are provided in all spheres of human life which they have acquired a certain value thanks to. Nevertheless, some aspects of this area legal regulation are still insufficiently regulated. So, Art. 128 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation) recognizes the service as an object of civil rights but does not give it a full definition, does not define its features. The provision of Art. 783 of the Civil Code of the Russian Federation essentially muddies the water under which the general provisions on the labour contract are applied to fee-based service contracts if there is no

contradiction with Art. 779-782 of the Civil Code of the Russian Federation. For the most part, the legislation contains a sufficient number of regulations that can be adopted for fee-based service contracts but lacks the necessary distinction between services and works as such.

"Regulatory forms are a set of legal acts that establish legal norms (actually the form of law)." As part of the legal regulation of fee-based services, it is necessary to mention the norms of the Civil Code of the Russian Federation, which regulate various relations groups for the provision of services. For example, Chapter 37 of the Civil Code of the Russian Federation regulates the labour contract, Chapter 38 of the Civil Code of the Russian Federation - an agreement for the performance of research scientific work. In accordance with clause 1 of Article 779 of the Civil Code of the Russian Federation, the service involves the performance of a number of actions aimed at achieving a certain result.

Active development and technological expansion requires business changes in the services provided. There is a gradual digitalization of services, they are moving into the online sphere. The modern consumer wants to receive the necessary product without leaving home. Such a need can only be fully satisfied through distance contracting. "The practice of recent years has revealed significant problems in the legal regulation of property relations between spouses in the context of the digital transformation of the economy." This fully applies to the provision of services.

Today, it is a common practice to make contracts of purchase and sale or to provide fee-based services without the personal presence of the client. As a rule, these are adhesion agreements. Declaration of assent with the contract terms and the intention to sign it is the performance by the client of the actions specified in the contract (for example, website logging, order finalization, etc.).

Article 128 of the Civil Code of the Russian Federation classifies the service as an object of civil rights, placing it in the same row with works, intangible benefits, property and information. At the same time, the legislator does not provide a comprehensive definition of a service, which does not allow in practice to single out its features and characteristics. In this regard, it is proposed that paragraph 1 of Art. 779 of the Civil Code of the Russian Federation shall be supplemented with the following definition:

A service is a bilateral activity that is aimed at achieving, creating and transferring to the customer an agreed result for its further use for personal purposes. The result of a service can be tangible or intangible. Services are becoming more widespread in various spheres of life: property and personal non-property relations. "Property relations that develop between individual family members, for example, spouses, can have a significant impact on the property status not only of the entire family business, all family members, but also on the business sphere on the scale of big business organization. Consequently, there is an objective need for legal regulation and support of property family business relationships aimed at organizing and implementing family business. "

Based on the content of Art. 128 of the Civil Code of the Russian Federation, as well as taking into account the norms of Ch. 39 of the Civil Code of the Russian Federation, it can be argued with confidence that services are a specific subject of the contract, therefore the customer is very interested in choosing the contractor as accurately as possible. The subject is the main condition that must be agreed upon when signing contracts, including when it comes to a fee-based service contract (clause 1 of article 432 of the Civil Code of the Russian Federation) (Levushkin, 2018).

The subject of the fee-based service contract is its essential condition. The subject of the contract as an essential condition of all civil contracts. The lack of agreement on the subject not only determines an uncompleted agreement, which in its turn does not give rise to the rights and obligations of the parties, but also does not allow us to talk about what kind of agreement the parties intend to conclude.

Also, special attention must be paid to the timing, specifics of payment for services and the amount of remuneration in such contracts. If necessary, you can always specify the list of actions in

details that must be performed by the contractor in order to make the subject of the agreement more understandable and concretized. Fee-based service contract must contain a list of the rights and obligations of the parties in order to minimize possible cases and facts of unfair performance of obligations by the parties.

It is extremely important to determine their place and role in civil circulation for most civil law contracts. "In modern society, most spheres of life are based on contractual relationships, including those of an entrepreneurial and organizational nature." Today, fee-based security service contract is a bilaterally binding, consensual, fee-based contract, which, as usual, is of a continuing nature and is aimed at providing services of an actual nature. Its participants can be persons of the consumer and business sphere (Levushkin, 2017).

Article 128 of the Civil Code of the Russian Federation recognizes the service as an object of civil rights, thanks to which the participants in civil legal relations are able to make various contractual structures upon the provision of fee-based services. In addition, chapter 39 of the Civil Code of the Russian Federation is devoted to important issues of fee-based services, which, according to the legislator, should help interested subjects of law in the process of providing services to each other in various spheres of life. Practice shows that very often there are contracts on works and services, which, meanwhile, the legislator does not divide among themselves, does not highlight individual characteristic features and properties that would allow them to be differentiated.

In the course of legislation reform governing entrepreneurial and commercial relations, rules appeared on several new special contractual business structures. In law enforcement, individual results of the law of obligations reform aimed at the application of special agreements are evident. These contractual structures make it possible to determine standard conditions included in the content of contracts, to establish general rules for contractual cooperation of the parties in the future. There are difficulties in qualifying a number of property and organizational contracts, determining their legal nature (Levushkin, 2018).

The parties to fee-based service contract can be both companies and individuals. The legal basis for signing, changing and terminating fee-based service contract is laid down in Chapter 39 of the Civil Code of the Russian Federation. It follows from the content of Art. 783 of the Civil Code of the Russian Federation, that the contractor under the contract voluntarily assumes obligations to provide the service, and the customer, in their turn, guarantees payment for the service after its provision. The subject of a fee-based contract can be a wide variety of services: Medical, educational, informational, auditing, financial, travel, security and others.

The use of the mechanism for signing, changing and terminating a fee-based service contract, as a rule, makes it possible to secure the creditor, who always wants to be sure that the debtor will fully and timely fulfill their obligations. For example, a penalty as a way of securing an obligation cannot be used in contracts where obligations do not actually require their performance, or are completely absent (for example, a donation agreement). In many cases, penalty as a way of fulfilling an obligation is used in bilateral agreements, where each party is obliged to perform certain actions, which, in fact, fill the agreement with content, make civil circulation full, contribute to its development and strengthening of relations.

It shall be noted that in case of non-fulfillment of the obligation, the question arises of the illegality of the parties' actions. Usually, it is illegal for the debtor to behave in such a way that their behavior clearly contradicts the requirements of the law, the provisions of the signed agreement, or the established customary business practices. Thus, article 1064 of the Civil Code of the Russian Federation dedicated to the general grounds of civil liability, there is a third clause providing for damage compensation caused by lawful actions. This approach distorts the essence and functional purpose of wrongfulness. It is advisable to exclude clause 3 from Article 1064 of the Civil Code of the Russian Federation. In addition, an article can be introduced into the Civil Code of the Russian Federation, which will be meaningfully devoted to compensation for harm caused by lawful acts.

In order to avoid violations of rights, the consumer can always refuse to conclude an agreement with the contractor if information about the service is not provided in a timely manner. The buyer has the right to claim damages resulting from unjustified evasion from the contract signing. The buyer has the right to terminate the purchase and sale agreement within a reasonable time and demand compensation for damages in the absence of relevant information about the service. Materials of judicial practice indicate that the performers may include provisions that have not previously confirmed in the fee-based service contract concluded with the consumer.

Thus, the Moscow City Court in case No. 33-21933/ 2016 of June 30, 2016 satisfied the consumer's demand to terminate fee-based cosmetic services contract. The claimer insisted that while carrying out a free cosmetic procedure and a demonstration of cosmetic products they signed documents for the provision of services. It was later revealed that the claimer had signed a loan agreement for the purchase of a cosmetic kit. The court, having considered the materials of the case, noted that the service provider in this case did not provide the consumer with full information about the service, and the concluded contract that was not read by the claimer could not become the basis for unconditional satisfaction of meeting their requirements.

According to paragraph 1 of Art. 454 of the Civil Code of the Russian Federation, the subject of a sale and purchase agreement may be goods that the seller has at the time of the contract conclusion or that will be created (purchased, received) by the seller in the future. So, the Industrial District Court of Smolensk in case No. 2-1181/ 2018 dated April 6, 2018 partially satisfied the claim of citizen L. to the SPP Betongarant. The claimer ordered blocks from the defendant for the fence construction on the land parcel. The defendant delivered goods of inadequate quality to the claimer several times, as a result of which she suffered losses in connection with the workers' downtime. In addition, the defendant violated the agreement on the timing to replace the consignment.

Based on the content of Art. 454, 455 of the Civil Code of the Russian Federation, it can be concluded that the legislator equates the concepts of "property" and "goods". So, paragraph 2 of Art. 455 of the Civil Code of the Russian Federation indicates that property rights may also be the subject of a purchase and sale agreement. Clause 5 of Art. 656 of the Civil Code of the Russian Federation directly refers property rights to the category of goods.

Therefore, the norms of the Civil Code of Russia give grounds to define goods as "property in the form of things, a set of things, property rights and obligations." Defining the concept of "goods" through the category of things and separately - through the category of property rights, we are faced with the fact that the concept of "thing" in terms of volume does not include the concept of "property rights", which contradicts Art. 128 of the Civil Code of the Russian Federation. So, according to Art. 128 of the Civil Code of the Russian Federation, property rights are non-consumer things and are recognized as material rights. Taking into account the content of Art. 128 of the Civil Code of the Russian Federation, the concept of "thing" should include the concept of "property rights".

The legal analysis of rights protection peculiarities and interests of the parties under the fee-based service contract allows us to single out, first of all, the compensation protection regime, the essence of which is that the right is protected exclusively by claiming monetary compensation from the violator. This excludes the possibility of literal restoration, therefore, it is impossible to achieve preventive suppression. Separately, it should be said about the regime of absolute protection, which implies granting the injured party with additional powers, allowing to suppress or to restore the lost right. Moreover, this regime operates without prejudice to the rights of its owner to collect monetary compensation, if such a need exists.

Protection mechanism of the parties' rights and interests for fee-based service contract has the following features:

Responsibility basis is the violation of rights and interests of the parties under a fee-based service contract;

- 1) Establishment the fact of interests' violation of the parties under the fee-based service contract. For example, liability measures can be included directly in the contract itself, in accordance with which the parties assume certain obligations. Failure to fulfill an obligation, or its improper fulfillment, can already be regarded as a violation entailing liability;
- 2) Violation of rights is committed by a certain party under a fee-based service contract;
- 3) Responsibility measures are accompanied by public enforcement;
- 4) Violation of rights and interests of the parties under a fee-based contract entails for the offender himself the onset of negative consequences of a personal or property nature.

Interests and rights of the parties are violated and obligations are not always fulfilled in a timely manner and in full under fee-based service contracts. The materials of judicial practice analyzed in this chapter made it possible to identify a number of problems and difficulties that the parties face when fulfilling their obligations under fee-based service contracts.

In particular, one of the ways to protect violated rights of the parties under fee-based service contracts is a forfeit, which is paid by the debtor in case of improper performance or non-performance of obligations in relation to the counterparty under the fee-based service contract. As a responsibility measure for the parties under the fee-based service contract, the penalty confirms the fact that the parties can achieve a legitimate result only through legal behavior.

In the context of the liability of the parties under the fee-based service contract, an equivalent balance between losses and compensation is important. Hence, there are exceptions to this rule. So, according to Article 394 of the Civil Code of the Russian Federation, the legislator allows the possibility of recovering losses not only in full, but also in excess of the legal or contractual penalty.

## CONCLUSION

Based on the analysis of the legal contractual regulation of fee-based services carried out in this article, it seems necessary to formulate the main conclusions and make the following proposals:

- 1) Article 128 of the Civil Code of the Russian Federation classifies the service as an object of civil rights, placing it in the same row with works, intangible benefits, property and information. At the same time, the legislator does not provide a comprehensive definition of a service, which does not allow in practice to single out its features and characteristics. In this regard, it is proposed to add the following definition to paragraph 1 of Art. 779 of the Civil Code of the Russian Federation:
- 2) "A service is a two-way activity aimed at achieving, creating and transferring to the customer an agreed result for its further use for personal purposes. The result of the service can be tangible or intangible. "
- 3) Within the framework of the fee-based services, a strong relationship between the categories of good faith and abuse of law acquires particular importance, however, there is no full definition of good faith (clause 3 of article 1 of the Civil Code of the Russian Federation), which can complicate the practical execution of fee-based service contracts to a certain extent, subject to the inadmissibility principle of law abuse.

We believe that we should abandon the search for a single-faith definition of the principle of good faith. We consider it sufficient if the legislator determines a number of key features for good faith:

- Violation of subjective rights of other participants in legal relations when certain consequences occur;
  - Subject delusion or ignorance the circumstances that can lead to a violation of subjective rights;
  - Delusion should arise in the absence of guilt (intent and negligence) of the participant in the legal relationship.
- 4) Using the definition "protection" in the framework of judicial protection of the legitimate interests of the parties under the fee-based service contract, it is assumed that it is used precisely in the broad sense of understanding the methods of protection developed by domestic practice. Legal protection is aimed at restoring

or recognizing individual rights, *i.e.*, to defense in case of violation or challenge. The right to defense is defined as the opportunity provided to the parties to the fee-based service contracts for the protection and restoration of the violated rights of the parties.

- 5) There is a third clause providing for compensation for damage caused by lawful actions in article 1064 of the Civil Code of the Russian Federation, dedicated to the general grounds of civil liability. We believe that this approach distorts the essence and functional purpose of wrongfulness. It is advisable to exclude clause 3 from Article 1064 of the Civil Code of the Russian Federation. In addition, an article can be introduced into the Civil Code of the Russian Federation, which will be meaningfully devoted to compensation for harm caused by lawful acts.
- 6) Clause 1 of Article 416 of the Civil Code of the Russian Federation indicates release from liability in the event of force majeure circumstances. Force majeure cannot be considered a violation of an obligation by the debtor's counterparty, or the absence of the necessary goods on the market when fulfilling obligations, or a lack of funds. At the same time, clause 3 of article 401 of the Civil Code of the Russian Federation operates with insufficient indication of force majeure.

It is necessary to clarify the norms and make changes to the content of the specified paragraph, which will allow to clarify: force majeure is not directly related to the actions of the person, it is not connected with his volitional behavior. Lack of will and guilt as a consequence cannot be considered as a basis for the onset of civil liability.

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